IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2780 OF 2006

A.L.Gulati ...Petitioner.

Versus

Joginder Pal Marwaha (since deceased), Rakesh Kumar Joginder Pal Marwaha and Anr. ...Respondents.

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Mr.R.S.Datar, Advocate for the Petitioner.
Mr.D.P.Adsule, APP, for State.

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CORAM : SMT.V.K.TAHILRAMANI,J.

DATED : 26th February, 2007.

P.C.:

1. Heard the learned Advocate for the petitioner-orig.accused and the learned APP for the State.

2. The petitioner is facing prosecution in Case No.142/SS/2006, which is pending before the learned M.M., 31st Court, Vikroli, Mumbai. The said case is under the N.I.Act.

3. The said case was instituted on a complaint

of Joginder Pal Marwaha. However, during pendency of the case before the learned Magistrate, the complainant expired. Therefore, complainant's son namely Rakeshkumar Joginderpal Marwaha preferred an application for substituting him as the complainant. The said application was allowed. Thereafter summons was issued to the accused. Being aggrieved by this, the petitioner preferred revision before the Sessions Court. By order dated 6.12.2006 the said Revision came to be dismissed by the Sessions Court. Being aggrieved thereby, this Petition has been preferred.

4. Mr.Datar submitted that on the death of original complainant, the proceedings ought to have been terminated and the learned Magistrate was not right in allowing the complainant's son to be substituted and continuing the proceedings. He further submitted that substitution in the event of death of the complainant is possible only after cognizance was taken after recording of verification of the original complainant.

5. Mr.Datar submitted that in the present case the complainant died before his verification could be recorded by the learned Magistrate. He submitted that in view of Section 200 of Cr.P.C., a Magistrate can take cognizance of the complaint only after the complaint was verified by the complainant. He has submitted that in the present case, as the complainant died before his verification could be recorded, the learned Magistrate could not have taken cognizance and issued process against the petitioner.

6. In support of his contention, Mr.Datar has placed reliance on Para-23 of the decision of the Supreme Court in the case of **Associate Cement Company Ltd., Vs. Keshavchand, AIR 1998 SC 596.**

. In Para-23 of the said decision, it is observed that Section 200 Cr.P.C. enjoins on the Magistrate who takes cognizance of an offence on a complaint, to examine the complainant on oath. Mr.Datar submitted that in view of this decision, compliance of Section 200 Cr.P.C. was necessary

by the Magistrate before he took cognizance and issued process.

7. I have perused the said decision. The said decision is not on the point as to what procedure ought to be followed in case the complainant dies during the pendency of the case. It can be said to be the *ratio decidendi* of the judgment if the following requirements are met :

(a) The issue involved must be directly and substantially in issue in the case.

(b) The issue needs to be decided, and

(c) There are reasons given in the judgment while deciding the issue.

. If the judgment in the case of **Associate Cement Company** (supra) is considered, it is seen that the point involved in this case was not in issue in the said case.

8. The Supreme Court has observed in the case of **Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd. reported in (1992) 4 SCC 363** as under :

> "....It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the question which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court to support their reasonings. In **Madhav Rao Schindia Vs. Union of India**, this Court cautioned :
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> "It is not proper to regard a word, a clause or a sentence occuring in a judgment of the Supreme Court, divorced from its context as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

9. In the case of **Associate Cement Company** (supra), the question did not arise for

consideration as to whether if a complainant dies, he can be substituted by another person. Hence, the one line in paragraph 23 of **Associate Cement Company** (supra) cannot be divorced from the context of the question under consideration and treated as complete law declared on the subject that in the case of death of a complainant, he can be substituted only after recording of verification of original complainant.

10. In the case of **T.N. Jayarajan Vs. Jayarajan, (1995) 82 Company Cases 629**, it has been held that Section 256 of Cr.P.C. does not postulate that whenever the complainant is absent and whatever be the cause for it the Magistrate has no option but to acquit the accused. The Court observed that wide discretion is given to the Magistrate to adjourn the case for hearing to some other day if he finds proper reasons to do so. It is further observed that this power is also available in the case of the complainant's absence on account of his death. The Court added that it is within the discretion of the trying

Magistrate in a proper case to allow the complainant to continue by a proper and fit complainant, if the latter is willing and and the Magistrate could grant permission to the Son of the deceased complainant to proceed with the complaint.

11. In the case of **India Vs. Surgent Nagarajan, (2004) 118 Company Cases 658 (Mad),** it has been held that on the death of complainant, heirs of complainant can be brought on record.

12. In the case of **Helen C. Pinheiro & Ors. Vs. M/s. Kamaxi Steel Products, 2000 Cri.L.J. 1622 (Bom)**, it has been observed by this Court that :-

> "when the son of complainant has stepped in and wanted to continue the case, Section 256 (2) of the Cr.P.C. will not come to the rescue of the accused persons in any manner whatsoever."

. It has been further observed that :-

> The important features which are to be proved are issuance of the cheques, dishonour of the cheques and these could have been proved even in the absence of the

> complainant being represented by this Lawyer. Therefore, by induction of the son of the complainant after his death cannot be said to create a situation in favour of the accused persons claiming acquittal or discharge. The mere death of a complainant cannot ipso facto terminate the criminal proceeding.

13. In the proceedings under section 138 of N.I.Act, what is required to be *prima facie* shown for issuing of summon/process is that there exists legal liability in discharge of which the cheque/s has/have been issued and the same have been dishonoured on presentation, that the necessary statutory notice has been given and thereafter within the stipulated period, complaint has been filed. Admittedly, these facts can be ascertained from the documents placed on record and for the same, the verification by the complainant personally is not necessary. In other words, it cannot be said that on the death of complainant before recording of his verification, the proceeding must terminate and the accused is required to be acquitted.

14. Looking to the above decisions, no case is

made out for interference with the order dated 6.12.2006 passed by the learned Sessions Judge. Writ Petition is rejected.

(SMT.V.K.TAHILRAMANI,J.)